Kerajaan Malaysia (Jabatan Kerja Jaya) v Hanaz Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)(NCvC)-150–03 OF 2018
HAMID SULTAN, YAACOB MD SAM AND LAU BEE LAN JJCA
7 OCTOBER 2020

Civil Procedure — Damages — Assessment of damages — Judicial commissioner allowed plaintiff's claim for damages for loss of profits and costs — Whether judicial commissioner correct in assessment of damages for loss of profits and awarded sum — Whether judicial commissioner applied correct principle of law — Whether amount based on entirely erroneous estimate of loss of profits which was not supported by evidence

This was an appeal by the appellant ('defendant') against the decision of the High Court on the award of damages and costs to be paid to the respondent. The respondent's ('plaintiff') cross appeal against the said decision was to the extent that the quantum of damages and costs awarded to the respondent was grossly insufficient and inadequate. The plaintiff was appointed as the main contractor by the defendant for the construction work ('the project'). However, due the failure of the parties to obtain the development order of the project from the local authority, the completion period was extended by the defendant. Later, the plaintiff had received the notice of mutual termination of the project from the defendant whereby the plaintiff was directed to stop all works relating to the project and vacate the site from the date of the notice. The plaintiff was also directed by the defendant to provide the details of the compensation as a result of the termination. The defendant had proposed parties to sign a mutual termination agreement whereby the defendant had offered to pay the plaintiff a sum of RM558,430.01 being a full and final settlement. The plaintiff had rejected the offer, resulting in this action. The learned deputy registrar ruled that the plaintiff had failed to prove the general damages. He, however, awarded the plaintiff a nominal damage for a sum of RM40,000 with no order as to costs. Aggrieved with the decision, the plaintiff appealed to the judge in chambers. The learned judicial commissioner of the High Court ('the learned JC') set aside the decision of the deputy registrar and allowed the plaintiff's claim for damages for loss of profits in the sum of RM6,255,000 together with interest and costs of RM15,000 in favour of the plaintiff. Hence, this appeal by the defendant.

Held:

(1) Nothing in the grounds of judgment of the learned JC to indicate that he preferred the evidence of the plaintiff's witnesses than the defendant's

witnesses. The learned JC accepted in toto SP1's report on the loss of estimated profit without evaluating the evidence of SP1 which was challenged by the defendant. There were no findings made by the learned JC that that the method adopted by SP1 in his report as a reasonable way of assessing the loss of profits and that the plaintiff had proved his case. There was no credible evidence by the plaintiff to substantiate that the plaintiff had suffered loss of profits by RM13,438,082.60 or RM6,225,000 as what was awarded by the learned JC. There was no basis on the award of 15% for the loss of profits. The learned JC had erred in principle in his assessment of damages for loss of profits. In the circumstances, the plaintiff had not proved its claim for loss of profits. The basis upon which the learned JC had assessed the award of damages for loss of profits could not be supported by evidence and in law (see paras 40, 43–44 & 47).

(2) In the result, the appeal was allowed with costs, the order of the High Court was set aside and the order of the deputy registrar was reinstated, that the defendant do pay to the plaintiff nominal damages of RM40,000. The cross-appeal must fail and was accordingly dismissed with costs. Costs of RM20,000 against the plaintiff was ordered (see paras 48–50).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan') terhadap keputusan Mahkamah Tinggi mengenai award ganti rugi dan kos yang harus dibayar kepada responden. Rayuan balas responden ('plaintif') terhadap keputusan tersebut adalah setakat jumlah ganti rugi dan kos yang diberikan kepada responden amat tidak mencukupi dan kurang. Plaintif dilantik sebagai kontraktor utama oleh defendan untuk kerja pembinaan ('projek'). Namun, kerana kegagalan pihak-pihak untuk mendapatkan perintah pembangunan projek daripada pihak berkuasa tempatan, maka masa penyelesaiannya dilanjutkan oleh defendan. Kemudian, plaintif telah menerima notis penamatan projek secara bersama dari defendan di mana plaintif diarahkan untuk menghentikan semua kerja yang berkaitan dengan projek tersebut dan mengosongkan tapak dari tarikh notis. Plaintif juga diarahkan oleh defendan untuk memberikan perincian pampasan akibat penamatan tersebut. Defendan telah mengusulkan pihak-pihak untuk menandatangani perjanjian penamatan bersama di mana defendan telah menawarkan untuk membayar plaintif sejumlah RM558,430.01 sebagai penyelesaian penuh dan terakhir. Plaintif telah menolak tawaran tersebut, yang mengakibatkan tindakan ini. Timbalan pendaftar yang bijaksana memutuskan bahawa plaintif gagal membuktikan ganti rugi am. Beliau, bagaimanapun, menganugerahkan plaintif ganti rugi nominal sebanyak RM40,000 tanpa perintah kos. Terkilan dengan keputusan itu, plaintif merayu kepada hakim dalam kamar. Pesuruhjaya kehakiman yang bijaksana Mahkamah Tinggi ('PK yang bijaksana') mengetepikan keputusan

timbalan pendaftar dan membenarkan tuntutan ganti rugi plaintif kerana kehilangan keuntungan berjumlah RM6,255,000 berserta faedah dan kos RM15,000 memihak kepada plaintif. Oleh itu, rayuan ini oleh defendan.

Diputuskan:

(1) Tidak ada alasan dalam penghakiman PK yang bijaksana yang menunjukkan bahawa beliau mengutamakan keterangan saksi plaintif daripada saksi defendan. PK yang bijaksana menerima keseluruhan laporan SP1 mengenai kehilangan anggaran keuntungan tanpa menilai keterangan SP1 yang dicabar oleh defendan. Tidak ada penemuan yang dibuat oleh PK yang bijaksana bahawa kaedah yang digunakan oleh SP1 dalam laporannya sebagai cara yang munasabah untuk menilai kerugian keuntungan dan bahawa plaintif telah membuktikan kesnya. Tidak ada keterangan yang boleh dipercayai oleh plaintif untuk membuktikan bahawa plaintif telah mengalami kerugian keuntungan sebanyak RM13,438,082.60 atau RM6,225,000 sebagai apa yang diberikan oleh PK yang bijaksana. Tidak ada asas pemberian 15% untuk kerugian keuntungan. PK yang bijaksana telah melakukan kesalahan pada prinsipnya dalam menilai kerosakan atas kerugian. Dalam keadaan seperti itu, plaintif tidak membuktikan tuntutan kehilangan keuntungan. Asas di mana PK yang bijaksana menilai award ganti rugi kerana kehilangan keuntungan tidak dapat disokong oleh keterangan dan undang-undang (lihat perenggan 40, 43–44 & 47).

(2) Oleh itu, rayuan dibenarkan dengan kos, perintah Mahkamah Tinggi diketepikan dan perintah timbalan pendaftar dikembalikan, bahawa defendan membayar ganti rugi nominal sebanyak RM40,000 kepada plaintif. Rayuan balas harus gagal dan dengan itu ditolak dengan kos. Kos sebanyak RM20,000 terhadap plaintif diperintahkan (lihat perenggan 48–50).]

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)
Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor [2015] 2 MLJ 24, CA (refd)
Flint v Lovell [1935] 1 KB 354, CA (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86; [1980] 1 LNS 31, FC (refd)
Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)
Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd [1995] 2 MLJ 257, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)

Legislation referred to

Contracts Act 1950 s 74

Appeal from: Civil Suit No 21NCVC-193–08 of 2012 (High Court, Kuala Lumpur)

Azlina bt Mahmod (Nur Irmawatie bt Daud with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
Badrul Hisham bin Mohamad Sani (Azman, Wan Helmi & Assoc) for the respondent.

Yaacob Md Sam JCA:

[1] This is an appeal by the appellant against the decision of the High Court, Kuala Lumpur given on 15 February 2018, on the award of damages in the sum of RM6,225,000 for loss of profits and costs of RM15,000 to be paid to the respondent.

[2] The respondent's cross appeal against the said decision is to the extent that the quantum of damages in the sum of RM6,255,000 and costs of RM15,000 awarded to the respondent is grossly insufficient and inadequate.

[3] The appellant is the defendant whilst the respondent is the plaintiff in the court below. We shall for purposes of this appeal refer to the parties as they were referred to in the High Court.

[4] Having heard the oral and written submissions of the parties, we have deferred our decision to a date to be fixed. We now give our decision.

BACKGROUND FACTS

[5] The plaintiff was appointed as the main contractor by the defendant for the construction work known as 'Cadangan Pembinaan Pusat Latihan Juvana Penjara Malaysia' on Lot 2238, Mukim Dengkil, Daerah Sepang, Selangor ('the project').

[6] The plaintiff and the defendant executed a contract dated 16 July 2010 for the contract sum of RM41.5m. The completion period was 12 months and expected to be completed on 31 March 2011.

[7] However, due the failure of the parties to obtain the development order of the project from the local authority, the completion period was extended ('EOT') by the defendant twice to 25 November 2011 and then to 24 November 2012.

[8] Pursuant to a meeting held between the plaintiff and the defendant on 6 December 2011, the defendant intimated to the plaintiff that it was minded to terminate the project. By a statement of agreed facts dated 6 December 2012, it was agreed by parties that the termination of the project by the defendant was not by a reason of any breach on the part of the plaintiff of any terms or conditions of the contract in respect of the project. It was also agreed that the termination was not as a result of the negligence on the part of the plaintiff.

[9] On 8 November 2011, the plaintiff had received the notice of mutual termination of the project from the defendant whereby the plaintiff was directed to stop all works relating to the project and vacate the site from the date of the notice. The plaintiff was also directed by the defendant to provide the details of the compensation as a result of the termination.

[10] On 30 May 2012, the defendant had proposed parties to sign a mutual termination agreement whereby the defendant had offered to pay the plaintiff a sum of RM558,430.01 being a full and final settlement. The plaintiff had rejected the offer, resulting in this action.

THE TRIAL AND THE APPEAL THAT FOLLOWED

[11] The trial commenced before another High Court judge. After a full trial, on 27 June 2013 the learned trial judge had dismissed the plaintiff's claim and awarded costs of RM15,000 to the defendant. Aggrieved by the decision, the plaintiff appealed to the Court of Appeal.

[12] On 13 February 2014, the Court of Appeal allowed the plaintiff's appeal. The Court of Appeal further ordered that the matter be remitted to the High Court for purposes of assessment of general damages by the deputy registrar of the High Court.

[13] For ease of reference, the order of the Court of Appeal is reproduced below (at p 15 record of appeal *Jld* 1):

> (a) rayuan ini dibenarkan;
>
> (b) penghakiman Mahkamah Tinggi Kuala Lumpur bertarikh 27 June 2013 diketepikan;
>
> (c) kes ini dikembalikan kepada Mahkamah Tinggi Kuala Lumpur untuk perbicaraan taksiran gantirugi am seperti *yang dituntut dalam perenggan (c) Pernyataan Tuntutan untuk ditafsirkan di hadapan Timbalan Pendaftar*; (emphasis added.)
>
> (d) responden membayar kepada perayu kos rayuan di Mahkamah Rayuan dan Mahkamah Tinggi sebanyak RM15,000; dan

(e) deposit dikembalikan kepada perayu.

THE ASSESSMENT OF DAMAGES BEFORE THE DEPUTY REGISTRAR

[14] The assessment of damages was conducted by the learned deputy registrar by way of a full trial. The plaintiff had called two witnesses, namely SP1 (Sr Jamaludin Abu Samah) who is a quantity surveyor by profession and a partner of Messrs AZM Perunding Ukur Bahan and SP2 (Zaharin bin Mar Arif), the managing director of the plaintiff.

[15] The defendant called two witnesses, namely SD1 (Sr Amran Mohd Majid), who is the director of contract policy at the department of works ('JKR') and SD2 (Nuridatul Ema Saaidin), who at that material time was the quantity surveyor cum senior assistant director of the JKR.

[16] At the trial, the plaintiff had claimed a total sum of RM18,472,509.11, the details of which are as follows:

(a) additional expenses incurred arising from the EOT granted for the sum of RM802,835.84;

(b) additional works in the preparation of site assessment report and rock blasting report for the sum of RM101,461.61;

(c) demobilisation costs as a result of the termination for the sum of RM34,000;

(d) the projected loss of profits in respect of the project for the sum of RM13,438,082.60;

(e) retrenchment benefit extended to four members of the plaintiff's permanent staff for the sum of RM151,484.21;

(f) the 14 subcontractors' claim for the total sum of RM3,678,396.85 which was calculated on the basis of 15% of the total subcontractor amount; and

(g) solicitors' fee for the sum of RM266,248.

DECISION OF THE DEPUTY REGISTRAR

[17] On 1 June 2017, the learned deputy registrar in his finding ruled that the plaintiff had failed to prove the general damages. He, however, awarded the plaintiff a nominal damages for a sum of RM40,000 with no order as to costs.

[18] For ease reference, the decision of the deputy registrar is reproduced

below (at p 66 appeal record *Jld* 1):

> (10) Plaintif menuntut sebanyak RM13,438,082.60 sebagai kerugian meraih keuntungan. Namun semasa perbicaraan di hadapan YA Hakim, plaintif menuntut kerugian meraih keuntungan adalah sebanyak RM12,916,733. Terdapat perbezaan ketara antara dua amaun yang dituntut oleh Plaintif ini. Berdasarkan SP1, jumlah RM13,438,082.60 didapati hasil dari jumlah kontrak penuh iaitu RM41,500,000 ditolak dengan bayaran kepada sub-kontraktor. Walau bagaimanapun, pada hemat mahkamah jumlah kerugian RM13,438,082.60 tidak dibuktikan oleh plaintif. Jumlah ini berbentuk spekulatif. Tiada keterangan yang menyokong bahawa plaintif akan memperolehi keuntungan dengan jumlah tersebut sekiranya projek ini berjaya dijalankan.
>
> (11) Bagi tuntutan plaintif sebanyak RM3,678,396.85 terhadap tuntutan sub-kontraktor, mahkamah ini berpendapat bahawa pihak plaintif gagal membuktikan bahawa 14 sub-kontraktor berkenaan membuat tuntutan terhadap plaintif sebanyak jumlah yang dipohon. Ia hanya andaian plaintif bahawa sub-kontraktor akan menuntut 15% dari harga kontrak keseluruhan. Tambahan pula tindakan plaintif melantik 14 sub-kontraktor walaupun plaintif mengetahui bahawa perintah pembangunan masih belum didapatkan, adalah pada pendapat mahkamah, tidak munasabah. Mahkamah bersetuju dengan pandangan peguamcara defendan bahawa perlantikan 14 sub-kontraktor ini adalah pra-matang.
>
> (12) Tuntutan plaintif terhadap perbelanjaan tambahan semasa lanjutan masa diberikan, kerja-kerja tambahan, retrenchment, yuran profesional dan lain-lain telah dituntut di dalam pernyataan tuntutan plaintif di perenggan (a) semasa perbicaraan di hadapan YA Hakim Mahkamah Tinggi. YA Hakim juga menolak tuntutan plaintif ini. Mahkamah Rayuan juga hanya mengarahkan taksiran gantirugi am dibuat bagi perenggan (c) pernyataan tuntutan plaintif sahaja. Oleh itu, mahkamah berpendapat bahawa plaintif adalah terhalang dari menuntut perkara yang telah diputuskan oleh Mahkamah Tinggi dan Mahkamah Rayuan.
>
> (13) Setelah mendengar keterangan saksi-saksi kedua belah pihak dan setelah mahkamah menilai keterangan-keterangan yang dikemukakan oleh pihak-pihak, mahkamah berpendapat bahawa plaintif tidak berjaya membuktikan kerugian am yang dialami. Oleh itu, mahkamah mengawardkan plaintif dengan gantirugi nominal sebanyak RM40,000.

[19] Aggrieved with the decision, the plaintiff appealed to the judge in chambers.

DECISION OF THE JUDGE IN CHAMBERS

[20] On 15 February 2018, the learned judicial commissioner of the High Court (the learned JC) set aside the decision of the deputy registrar and allowed the plaintiff's claim for damages for loss of profits in the sum of RM6,255,000 together with interest and costs of RM15,000 in favor of the plaintiff.

ISSUE BEFORE THIS COURT

[21] The main issue to be determined is one of quantum only, ie how much damages to be awarded to the plaintiff as the issue of liability on the part of the defendant has been settled with the Court of Appeal decision dated 13 February 2014.

[22] Thus, in determination of the assessment, the High Court cannot go beyond the parameter set out by the Court of Appeal. It is for this reason that the plaintiff cannot claim any special damages even if they were incurred since the order of the Court of Appeal was clear and could not be interpreted in any other way.

THE AWARD OF RM6,225,000 FOR LOSS OF PROFITS

[23] In making this award, the learned JC said this (at pp 80–81 of the record of appeal *Jld* 1):

> [30] In arriving at my conclusion, I have taken into account that the termination of the said project was not because of the defendant's fault either. It was terminated because of the fact that the parties had failed to get the development order from the relevant local authority. In other words, the defendant should not be unduly punished for the termination of the same.
>
> [31] I also take into account that the plaintiff being a well-established contractor must have been able to estimate its projected profit. But the sum of RM13,438,082.60, I must say, is very much on the high side notwithstanding the fact the said project was awarded on the basis of a direct negotiation.
>
> [32] The said figure RM13,438,082.60 is more than 30% of the original contract sum. I do not think that it is a reasonable estimation of the projected profit of the plaintiff. It is the plaintiff's case that the subcontractors would have made a projected profit of 15% of the total subcontract sum. 15% to my mind is reasonable. In all fairness, the plaintiff cannot come before me and say 'while my subcontractors makes 15% profit, I am entitled to more than 30%'.
>
> ...
>
> [34] In the result, the appeal is partly allowed. The decision of the learned deputy registrar on the nominal damages is set aside. My decision would be the plaintiff is only entitled to 15% of the total contract sum of RM41,500,000 which is RM6,225,000 and I so order.

[24] It appears that in coming to his decision the learned JC rejected SP1's proposition that the computation should be by reference to section D of SP1's report that concluded a figure of RM13,438,082.60 for the loss of profits. This is what the learned JC said (at pp 75–76 of the record of appeal *Jld* 1):

> [18] On claim (d) SP1 had this to say in his report:

A This project was secured by the contractor through direct negotiation. In any negotiated project, the contractor's pricing has taken into account all costs incurred necessary for the completion or the fulfillment of the project. In my opinion, it is unlikely that the contractor is going to suffer losses if the project were to proceed. In fact, it is not uncommon for the contractor to achieve a reasonable profit margin B because the contractor is not competing with other tenderers. Furthermore, the client (JKR) has to ensure that the contractor has sufficient profit so that the project can be completed successfully within the stipulated period. This is further verified from the letter of awards issued to the respective subcontractors. The early engagement of the subcontractors is justifiable in view of the completion period of 12 months which is considered 'short'. For the contract amount of RM41.5m the C contractor has to achieve a progress of approximately RM3.5m to RM4m monthly. This can only be achieved through proper planning, organising and control. For this the contractor engaged 14 subcontractors and specialist to assist him in achieving the target date. Had the project not being terminated, the contractor would be assured to enjoy the profits which he had accounted for. It is also safe to say D that the contractor is assured from any risk which involves variation in material prices because in this project, there's a special provision for variation of price which forms part of the contract document.

E **[25]** The learned JC found that the plaintiff's proposition for loss of profits in the sum of RM13,438,082.60 was more than 30% of the original contract sum. According to him, the sum claimed was unreasonable and was founded on a wrong assumption. It was the plaintiff's case that the subcontractors would have made a projected profit of 15% of the total subcontract sum. On this basis, the plaintiff claimed that they were entitled to a profit at the rate of F 30% of the contract sum. This lead the learned JC to conclude his own estimation and assumption that the plaintiff was only entitled to 15% of the total contractual sum of RM41,500,000 which is RM6,225,000.

G **[26]** Therefore, the pertinent question for our decision here is whether the learned JC was correct in his assessment of damages for loss of profits and the awarded sum. That raises the question whether he applied the correct principle of law or the amount was based on an entirely erroneous estimate of the loss of profits which was not supported by evidence. In other words, the two situations in which an appellate court would be justified in interfering by reassessment of H the damages would be where: (a) the trial judge has acted on a wrong principle; or (b) has made an entirely erroneous estimate of damages.

I **[27]** In considering the above question, we are mindful that the normal measure of damage for breach of contract in our jurisdiction is prescribed by s 74 of the Contracts Act 1950.

[28] Section 74 Contracts Act states:

Compensation for loss of damage caused by breach of contract

74 (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[29] Thus, with the above principles in mind, have the plaintiff proved its case on the balance of probabilities which entitled the plaintiff to damages for loss of profits?

[30] The position of law on the expressions of burden of proof and onus of proof has been lucidly explained by the Federal Court in the case of *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31, in the following words:

For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors* AIR 1961 SC 1474 at p 1478 and *Raghavamma v Chechamma* AIR 1964 SC 136 at p 143). The first sense, signified by the expression burden of proof such as referred to in s 101 of the Evidence Act is the burden establishing a case and this rests throughout the trial on the party who asserts the affirmative of this issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* (7th Ed) paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom the onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

[31] In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 367, Edgar Joseph Jr J (as he then was) said this:

I now turn to consider the crucial question; have the plaintiffs proved their claim for damages as alleged or at all? With regard to this part of the case, I would preface what I have to say by referring to certain well-established principles.

It is axiomatic that the plaintiff seeking substantial damages ha the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree

nominal damages. See, for example *Dixon v Deveridge* (1825) 2 C&P 109; 172 ER 50 and *Twyman v Knowles* 138 ER 1183.

[32] This brings to our mind the famous words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177, where in the following is stated:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This what I have lost, I ask you to give me these damages'. They have to prove it.

[33] Having laid down the relevant principle of law, we now revert to the present appeal. Learned counsel for the plaintiff argued that the plaintiff's claim for loss of profits of RM13,438,082.60 is ascertainable and has been proved by the evidence of SP1 and SP2. Learned counsel further argued that the plaintiff has discharged its onus of proof in that it had shown:

(a) an itemised breakdown of the costs for performing the remaining works of the projects; and

(b) an estimated profit.

[34] In respondent's further submission filed on the direction of this court, learned counsel for the plaintiff further contended that the plaintiff's claim for the sum of RM13,438,082.60 represents the measurement of damages by application of ordinary principle of loss of profit and had been proved with reasonable certainty. In support of his proposition, learned counsel cited *Halsbury's Law of Malaysia (Vol 5) Building and Construction* at p 295 where the author said:

> [140.153] Contractor's Rights To Damages. Where the employer repudiates the contract and no work at all has been carried out, the measurement of damages will be:
>
> (1) the contract price less the costs which the contractor would have had to bear in completing the works; ...

And at the footnotes the author said:

> (1) This represents the measurement of damages by the application of the ordinary principles of loss of profit and wasted expenditures; see *C and P Haulage (a firm) v Middleton* [1983] 3 All ER 94, [1985]1 WLR 1461, CA (Eng); *CCC Films (London) Ltd v Impact Quandrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298, and Contract (Original Title Scheme) [390.572].

[35] For the defendant, it was argued by the learned senior federal counsel ('SFC') that the plaintiff had failed in proving its losses. It is instructive to state that based on the evidence of SP1 and SP2, the managing director of the plaintiff, it was admitted that the plaintiff had subcontracted the entire works under the project to the 14 subcontractors.

[36] Under cross-examination by the SFC, this is what SP1 stated (at pp 127–128 record of appeal *Jld* 2(1):

> What is the purpose of development order?
> One of the requirements of construction would be initiated is that they must get approval.
>
> One of the requirement for construction?
> Before a construction can start, one of the requirement is that the client must obtain a development order.
>
> Does it mean that before the plaintiff commence construction and works, the development order must be obtained from the local authority Majlis Perbandaran Sepang is this?
> Yes
>
> Do you agree that this development order must be obtained at the early stage of it?
> The development order is supposed to be issued by the client.
>
> So, is that the reason why failure to obtain the development order, the plaintiff cannot commence the construction works?
> Yes
>
> Do you know whether the defendant managed to obtain temporary permit?
> I'm not aware.
>
> Do you agree that temporary permit was obtained for preliminary works ... and site clearance?
> I was informed, yes. Under preliminaries.
>
> Do you agree the plaintiff cannot do any further construction works even until the end of the contract period because of the (06:49)
> Yes.

[37] Under further cross-examination by the SFC, the SP1 has stated this (at pp 130–131 & 134–135 record of appeal *Jld* 2(1):

A

Do you agree by entering into 4 subcontractors, contractor has subcontracted the entire contract works?

Yes.

B

...

In your experience as a quantity surveyor and did in the industry, what is the normal level of profit for this type of construction?

For negotiated job with a short duration, it is not uncommon for the contractor to have a profit in the range of 30%.

C

And your answer was based on the assumption and estimation only?

Agree.

D

[38] Further, under cross-examination by the SFC on the SP1's report, this what was said by SP1 (at p 255 record of appeal *Jld* 2(1):

E

Since you devide that 12 months so it means that your report, your statement is assumption which is not based on the plaintiff works program.

No. It's not based on the program. I said approximately a figure that has got to be out on the average. It can be up and can be down. You see.

Can be up and can be down, ya.

F

Yes.

Do you agree that could reduce of derive that the plaintiff to achieve 3.5 until 4m. It must be based on cash flow projection expend by contractor based on the price stated in breakdown.

G

No. This is just indicative figure as I mentioned earlier in the report for them to prepare the program that is another issue. But this one as I said to justify the amount they has got to be done within a period of 12 months.

H

[39] PW2 the managing director of the plaintiff mere by adopted PW1's assessment of damages in the total sum of RM18,472,509.11.

[40] From the record, nothing in the grounds of judgment of the learned JC to indicate that he preferred the evidence of the plaintiff's witnesses than the defendant's witnesses and if so, the reasons therefore. Perusing the grounds of judgment, the learned JC did not refer to any of SP1 or SP2's evidence in deciding that the plaintiff was entitled for such amount that the learned JC has awarded. It appears that the learned JC accepted in toto SP1's report on the loss of estimated profit without evaluating the evidence of SP1 which was

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challenged by the defendant. There is no findings made by the learned JC that that the method adopted by SP1 in his report as a reasonable way of assessing the loss of profits and that the plaintiff has proved his case. The plaintiff as a contractor of *that is no mean feat* as described by the learned JC, was aware and should or ought to have known that the project is subject to the pre-condition of obtaining the development order (DO) from the local authority.

[41] In *Johara Bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139, Chang Min Tat FCJ stated (at p 142):

> ... it was all a matter of proof and that until and unless the plaintiff had discharged the onus on her to prove her case on a balance of probabilities the burden did not shift to the defendant and no matter if the defendant's case was completely unbelievable, the claim against him must in this circumstances be dismissed. With respect, we agree with this judicial approach.

[42] We are mindful, that in considering this appeal, and in particular, the grounds upon which an appellate court can be justified to interfere in the reassessment of the damages, we have reminded ourselves of what Greer LJ had said in *Flint v Lovell* [1935] 1 KB 354 at p 360:

> ... this court will be disinclined to reverse the finding of the trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a Jesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of damage to which the plaintiff entitled.

[43] With respect, the learned JC appears to have assumed, that the plaintiff had suffered a loss of profits, amounting to RM6,225,000. On the contrary, we find that there is no credible evidence by the plaintiff to substantiate that the plaintiff had suffered loss of profits by RM13,438,082.60 or RM6,225,000 as what was awarded by the learned JC. There is no basis on the award of 15% for the loss of profits. We find the learned JC had erred in principle in his assessment of damages for loss of profits.

[44] In the circumstances, viewed in totality, we unanimously of the view that the plaintiff had not proved its claim for loss of profits. With all this drawbacks, it is not surprising that the deputy registrar dismissed the plaintiff's claim pertaining to the issue of loss of profits and we totally agree with him.

[45] In the case *Depluri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2015] 2 MLJ 24, the Court of Appeal held:

A [6] Dalam ketiadaan bukti ganti rugi oleh perayu, RM70,575.45 dengan betul mewakili nilai kerja yang dilakukan oleh subkontraktor, diukur alas asas kuantum merit. Oleh kerana perayu gagal untuk memilih untuk menuntut sama ada untuk kehilangan keuntungan atau perbelanjaan sia-sia sahaja dan tuntutan sebagai tidak tidak elok kerana ketidakpastian dalam keadaan, mahkamah mengawardkan B sejumlah RM100,000 yang mana termasuk RM70,575.45 ditaksir oleh DW1 sebagai gantirugi nominal kepada perayu.

[46] In *Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd* [1995] 2 MLJ 257, VC George JCA (as he then was), said this:

C ... The projections to be worth anything should have been backed by evidence of inter alia wages to be incurred eg employment contracts, costs of material eg quotations from suppliers, actual prices at which medical practitioners purchased bottles and so on. In the absence of such evidence or of the like, the basis of the projections and the projections themselves appear to be mere speculation ... The D judge was perfectly justified in rejecting them as being mere 'conjecture' ...

[47] For the reasons given above, we are compelled to conclude, with respect, that the basis upon which the learned JC has assessed the award of damages for loss of profits cannot be supported by evidence and in law, having regard to the E present case and relevant authorities.

CONCLUSION

[48] In the result, we allow this appeal with costs, set aside the order of the F High Court dated 15 February 2018 and reinstate the order of the deputy registrar dated 21 July 2017, that the defendant do pay to the plaintiff nominal damages of RM40,000. The appeal is allowed with costs.

[49] In view of our conclusion on the award for loss of profits made by the G learned JC, the cross-appeal must fail and is accordingly dismissed with costs.

[50] We ordered costs of RM20,000 against the plaintiff here and below.

H *Order accordingly.*

Reported by Ahmad Ismail Illman Mohd Razali

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